IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.90 OF 2005
IN
SUIT NO.20 OF 2003
IN
TESTAMENTARY PETITION 669 OF 2002

Nitin H. Parikh ..Plaintiff

versus

C.H.Parikh & Another ..Defendant.

Mr.D.V.Merchant with R.L.Tolat i/b.L.C.Tolat & Co. for the Plaintiff in support.

None for the Defendant

Coram : S.R.Sathe, J.
Dated : 7th Dec., 2005

P.C.

1. Heard the learned Counsel for the Plaintiff. None appears on behalf of the Defendants.

2. By this notice of motion the plaintiff has prayed that till the disposal of the suit the defendants and their family members be directed to remove themselves from one room occupied by them in the flat No.A-803 Poonam Apartments, Worli, Mumbai and they be further restrained by an order of injunction from entering, remaining open and making use of the said room.

3. The plaintiff filed testamentary petition

for letters of administration with the will annexed as the last will and testament dated 25.6.2001 of his father- deceased Hiralal T. Parikh. According to him as per the said Will the flat mentioned above at Worli is bequeathed to him. The defendants opposed the petition on several grounds. It is the contention of the Defendant No.1 that he is in occupation of one room out of flat No.A/803 Poonam Apartments since the time of his father.

4. From the perusal of the record it appears that time and again the plaintiff filed notice of motion for getting possession of the room in question from the defendant no.1. However, every time his attempt in that behalf failed and this court rejected his notice of motion.

5. The present notice of motion is yet another attempt on the part of the plaintiff to get the possession of the suit room or to evict the defendant no.1 from the said room by hook or crook and by adopting a shortcut method.

6. At the outset it must be mentioned that initially it was the stand of the plaintiff that he and the deceased were in exclusive use and

occupation of the said flat and defendant no.1 is neither having any right nor is in possession of the said flat or any part thereof. However, the defendant no.1 specifically contended that he is in occupation of one room out of the said flat and thereafter the learned Advocate Mr.Dara Zaiwala, appearing on behalf of the plaintiff in the notice of motion No.2843 of 2002 made a statement that the respondent no.1 is in possession of the said flat A/803, but he has taken forcible possession thereof. Thereafter attempt was made by the plaintiff to evict the respondent by filing notice of motion No.2737 of 2002. However, the said attempt failed and on the contrary, this Court (Coram S.J.Vazifdar, J) on 31.10.2002 specifically observed that the defendant no.1, his wife, son and unmarried daughter are permitted to reside in the flat in one room. Even then the plaintiff took out another notice of motion bearing No.1713 of 2003. Therein also relief similar to the relief in the present notice was sought, but the same was rejected by this Court (Coram D.G.Deshpande, J.). Not only that, but the Court specifically observed

> "therefore, the order dated 31.10.2002 will continue till disposal of the suit."

So, there was in fact no reason for the plaintiff to file again any notice of motion for same relief. However, we find that the plaintiff again made similar attempt by filing notice of motion no.565 of 2004 and this Court (Coram S.K.Shah, J.) dismissed the said notice of motion on 8.7.2004.

6. Thus, we find that though similar prayer of the plaintiff was rejected by this Court on several occasions, the plaintiff is again seeking same relief in notice of motion. From the perusal of the prayer clause in this notice of motion, it is very clear that this is nothing but an attempt to secure possession of the room from defendant no.1. or to dispossess him by adopting slip short method. In fact it has been made clear that the order dated 31.10.2002 shall remain in force till the disposal of the matter. The plaintiff has not brought on record any such peculiar circumstance which would require modification of the said order. It is tried to be argued on behalf of the plaintiff that the defendant is in actual possession of another flat, the plaintiff's wife is ill and if injunction is issued against defendant no.1 he will not suffer loss. However, these points are not at all

relevant. Once it is held held that defendant no.1 is in occupation of one room out of the flat no.A/803, thenif it is the case of the plaintiff that the defendant has taken forcible possession of the said room, plaintiff has to file appropriate proceeding for securing possession of the said room. Merely because on the date of hearing of this matter the defendant no.1 and his advocate were absent, it cannot be said that order can be passed against the defendant no.1.

7. It does appear from record that the defendant was directed to pay proportionate outgoings of the said flat within stipulated period. However, the plaintiff is not able to point out as to what were the exact outgoings of the said flat and what was the amount that defendant no.1 was liable to pay. So under the circumstances, it is not desirable to evict the defendant no.1 on that count. If plaintiff is desirous of recovering any amount towards outgoings he may move the court in that behalf.

8. The learned counsel for the plaintiff has drawn my attention to a case **Conrad Dias of Bombay v. Joseph Dias, reported in AIR 1995 Bombay 210** in

order to point out that even if the defendant no.1 is in occupation of the said room, injunction as prayed can be issued against him. However, the facts of the said case and the facts of the case in hand are different. In the case cited above the father had filed a suit against his son alleging that he (father) is the owner of the suit house and his son has no legal right to remain in occupation of the same. It was held that the plaintiff had title to the suit property while the son (defendant) had no title, and right to remain in possession. So, under such circumstances it was held that the suit filed by the plaintiff is proper. However, in the instant case, admittedly, the flat in question was owned by the father of the plaintiff. According to plaintiff his father has bequeathed the said flat to him under will. However, the said will is in fact under challenge. Prima facie, the defendant is in actual occupation of one room since the time of his father. So, under such circumstances the above cited ruling is of no help to the plaintiff.

8. In this view of the matter, there is no substance in the present notice of motion . Hence the notice of motion is rejected.

(S.R.Sathe, J.)